No. 3385

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HENRY ALBERS,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Brief of Defendant in Error

Upon Writ of Error to the United States District Court of the District of Oregon.

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STATEMENT

The indictment in this case is drawn in seven counts. The first four counts are based upon the Act of Congress approved May 16, 1918, which is an amendment to the original Espionage Act of June 15, 1917; and the last three counts are predicated upon the original Act. The jury returned a verdict of "guilty" as to Counts Three and Four of the indictment and "not guilty" as to the remaining counts. The issue is, therefore, narrowed down to the construction of Counts Three and Four and to the determination as to whether there is any error in the record upon which the jury based its verdict of "guilty" thereon.

COUNT THREE charges that the defendant, on October 8, 1918, while traveling as a passenger upon a Southern Pacific Railroad train, enroute to Portland, Oregon, and at a point between Grants Pass and Roseburg, Oregon, did wilfully utter language intended to incite, provoke and encourage resistance to the United States and

to promote the cause of its enemies, by stating to and in the presence of L. W. KINNEY, L. E. GAMAUNT, J. A. MEAD, E. C. BENDIXEN, F. B. TICHENOR, and others to the Grand Jurors unknown, among other things, in substance and to the effect as follows, to-wit:

1. "I am a German and don't deny it—once a German, always a German."

2. "I served twenty-five years under the Kaiser (meaning William II, German Emperor) and I would go back to Germany tomorrow."

3. "I came here (meaning the United States) without anything and I could go away without anything."

4. "I came to this country (meaning the United States) supposing it was a free country but I find that it is not as free as Germany."

5. "McAdoo (meaning W. G. McAdoo, then and there Secretary of the Treasury of the United States) is a son-of-a-bitch. Why should this Government tell me what to do?"

6. "I am a pro-German; so are my brothers."

7. "A German can never be beaten by a Yank (meaning an American)."

8. "You (meaning the United States) can never lick the Kaiser (meaning William II, German Emperor)—never in a thousand years."

9. "There will be a revolution in this country (meaning the United States) in ten years—yes, in two—maybe tomorrow."

10. "I could take a gun myself and fight right here (meaning in the United States."

11. "To hell with America."

12. "I have helped Germany in this war, and I would give every cent I have to defeat the United States."

13. "We (meaning Germany) have won the war."

COUNT FOUR charges the defendant with having wilfully made the statements above set out with the intent to support and favor the cause of Germany and to oppose the cause of

the United States therein.

In both of these counts it is alleged that the statements so made by the defendant were made at a time when the United States was then at war with the Imperial German Government.

To each of these counts in the indictment, the defendant demurred, which demurrer was overruled. The demurrer challenged the sufficiency of Counts Three and Four, upon the following grounds:

1. That said counts did not state facts sufficient to constitute a crime against the laws of the United States.

2. That said counts are duplicitous.

3. That said Act of Congress is unconstitutional.

At the close of the testimony, a motion was made by the defendant for a directed verdict, which motion was denied.

The defendant seasonably excepted to the overruling of his demurrer, to the denial of his motions; as well as to the admission of statements made by defendant at other times than the occasion charged in the indictment; and to

the failure of the court to give certain requested instructions—all of which rulings are assigned as error.

It might be noted at the outset that the defendant in his statement practically concedes the making of the utterances attributed to him in the indictment, but contends that he was "heckled" in the making of them, while in a drunken stupor. These are matters peculiarly within the province of the jury for its consideration upon the question of intent, and will be treated at full under the appropriate assignment of error. But in view of the emphasis laid by counsel for defendant upon this particular issue in the case, with which he prefaces his brief, we feel it would not be amiss at this time to assure the court that the evidence clearly tends to show the contrary, to-wit: that Henry Albers was not "heckled" in making these utterances, but that he made them voluntarily and deliberately; that while it is true that he had been drinking, that drink was merely the stimulant which gave to Albers the bravado and courage to vent his spleen against the United States; that drink was merely the means of saying in public what was lodging in his heart and

mind, demanding utterance; that drink was merely an additional reinforcement which urged and prompted him to say aloud what he had always wanted to say,—to preach the German doctrines and propaganda, he had always wanted to preach, and to say and to do things that probably he would not have said and done without "this reinforcement." As an illustration, we might cite the lurking, sneaking traitor to his country, who, if alone, would heed the dictates of prudence and endeavor to escape detection by his countrymen of his perfidious conduct, but who, if reinforced by a sufficient number of traitors or if the loyalists be proportionately decreased, would brazenly reveal himself in his true colors; he would ignore the promptings of discretion but heed those of the vinglorious braggadocio.

ASSIGNMENT OF ERRORS

There are thirty-three assignments, but so far as they are argued, they present but four simple questions for review, and therefore may readily be grouped under the following headings:

1. Sufficiency of the Indictment.
2. Motion for Directed Verdict.
3. Admissibility of Testimony.

4. Failure to give Requested Instructions.

SUFFICIENCY OF INDICTMENT

(A) It is urged though not very strenously, that the Espionage Act as amended is unconstitutional in that it violates and abridges the freedom of speech guaranteed by the Constitution of the United States. This point has, however already been settled adversely to defendant's contention by the Supreme Court in the recent cases of *Schenck vs. U. S.,* 248 U. S. (March 3, 1919); *Debbs vs. U. .S.,* 248 U. S. (March 10, 1919); *Frowerk vs. U. S.,* 248 U. S. (March 10, 1919).

(B) It is further urged that Counts 3 and 4 are duplicitous in this: that they each attempt to charge two crimes against the defendant. As respects Count 3, it is contended that it charges (1) the crime of uttering language intended to incite, provoke and encourage resistance to the United States, and (2) the crime of uttering language intended to promote the cause of its enemies. As respects Count 4, it is contended that it charges (1) the crime of wilfully supporting and favoring the cause of a country with which the United States was at war and (2)

the crime of wilfully opposing the cause of the United States in said war.

Count 3 is framed upon the following provision contained in the Espionage Act as amended May 16, 1918, which, so far as material, reads as follows:

> "Whoever, when the United States is at war * * * * * shall wilfully utter, print, write, or publish any language intended to incite, provoke, or encourage resistance to the United States, or to promote the cause of its enemies * * * * *"

Count 4 is framed upon the following provisions contained in the same Act:

> "Whoever, when the United States is at war * * * * * shall by word or act support or favor the cause of a country with which the United States is at war, or by word or act oppose the cause of the United States therein * * * * *"

It must be plainly evident from an examination of these separate subdivisions of the statute, that the provisions thereof are so interrelated as to render it practically impossible to divide each of these subdivisions into two sep-

arate offenses. Furthermore, assuming the occasion might arise wherein certain language may encourage resistance to the United States during the war with Germany, and yet not promote the cause of Germany; after all, it is but one criminal act and has but one object in view, to-wit, the safeguarding of the American preparations necessary for the ultimate defeat of Germany. And so as to Count 4, even assuming that occasion might arise where certain words or acts may support the cause of Germany and yet not oppose the cause of the United States in this war, the object of this subdivision has a singleness of purpose that must be manifest, to-wit, that no word or act shall give aid or comfort to Germany, which might help to bring about the defeat of America.

However, irrespective of the exact determination of whether these subdivisions in the statute are divisible or not, we contend that as an elementary principle of pleading, these counts are not open to the attack of duplicity for where two separate offenses may be involved in the inclusion of one count, they may be properly embraced in one count where they are of a like class and nature as in this case.

The following citations found in Byrne on Federal Criminal Procedure, Section 152, furnish the necessary authority:

> "Duplicity consists of charging two distinct offenses against two separate statutes, punishable differently and requiring evidence of a different character.
>
> * * * *
>
> "Also when either of two acts is indictable and subject to the same measure of punishment, they may be charged in one count as one offense.
>
> * * * *
>
> "Likewise, several different intents may be charged in connection with one act, without rendering the indictment duplicitous, especially if no prejudice results to defendant.
>
> * * * *
>
> "If the indictment in charging one offense necessarily shows the commission of another by defendant, this does not constitute duplicity."

The following cases are submitted as supporting the doctrine that where a statute makes either

of two or more distinct acts connected with the same general offense and subject to the same measure and kind of punishment, indictable as separate and distinct crimes, when committed by different persons, or at different times, they may, when committed by the same person, or at the same time be coupled in one count as constituting one offense.

U. S. vs. Heinze, 161 Fed. 425.
U. S. vs. Clark, 211 Fed. 916.
Crain vs. U. S., 162 U. S. 625.
Connors vs. U. S., 158 U. S. 408.

In the last analysis, attention need only be called to Section 1025 of the United States Revised Statutes to dispose of this assignment of error. Under this statute, no indictment shall be deemed insufficient, nor shall the trial be affected by reason of any defect or any imperfection in matter of form only, which shall not tend to the prejudice of the defendant. It certainly will not be argued that the defendant was, or could have been prejudiced in any manner whatsoever by the presentation of the charge in the manner that it was presented in the indictment.

Attention might also be called to the fact that

in the case of the *United States vs. Louisville & N Railway Company,* 165 Fed. 936, the Court held that the fault of duplicity should be reached by motion to elect, rather than by demurrer and cites the Supreme Court cases of *Crane vs. U. S.* supra, and *Connors vs. U. S.* supra, as authority for its views.

In the case of the *U. S. vs. Dembowski,* 252 Fed. 894, an Espionage case, District Judge Tuttle held:

> "Where a statute creates a single offense, but specifies in the alternative different acts, any one of which will constiute the offense, the indictment may charge the commission of such offense by all of the means mentioned, using the conjunctive 'and' wherever the statute uses the word 'or' without being duplicitous."

In the case of *Balbas vs. U. S.,* 257 Fed. 17, it was likewise contended that a certain count in the indictment was duplicitous. The Court held:

> "Only one offense is alleged, which may be committed in two modes and both of these modes may be joined in one count."

The following Espionage cases are further submitted, where similar counts to those now under attack, were approved by the courts and further indicate the unanimity of the method pursued in various districts in charging these particular offenses denounced by the statute:

U. S. vs. Buessel, (Bulletin 131) District Judge Howe.

U. S. vs. Zadamack (Bulletin 134) District Judge Westenhaver.

U. S. vs. Martin (Bulletin 157) District Judge Sanford.

U. S. vs. Equi (Bulletin 172) District Judge Bean.

From the instructions given by these judges as set out in these bulletins, it would appear that the facts charged in each of Counts 3 and 4 are considered as constituting but one offense under the statute.

(C) It is further urged that in any event these counts do not state facts sufficient to constitute a crime against the laws of the United States or to charge a crime against this defendant.

The statute with which the defendant is

charged to have violated, was enacted obviously to meet the war danger to the Government, danger arising within the body of the people rather than danger from the enemy on the battle line, and the importance of this legislation lies in the fact that it embodies the policy which the Government has adopted for its protection, particularly against internal interference with its military operations and war program.

The purpose of the Act is a practical one,—when the Government is at war, it is entitled to the support of every citizen; it is not only entitled to be free from interference of its citizens in the conduct of the war or the preparations for the war, but it is entitled to the support of every citizen, and that is true whether the citizen is with the country or against the country, or whether he deems his country right or wrong in the matter of the war. After war is declared, it becomes his duty not only to abstain from any interference with the preparations of the country looking to war, but to support the war himself.

As so well expressed by District Judge Bledsoe, in the case of the *U. S. vs. Motion Picture Film "Spirit of* '76", reported in Bulletin 33:

"This is no time or place for the exploita-

tion of that which, at another time or place or under different circumstances might be harmless and innocuous in its every aspect. It is like the 'right of free speech' upon which such stress is now being laid. That which in ordinary times might be clearly permissible or even commendable, in this hour of national emergency, effort and peril, may be as clearly treasonable and therefore properly subject to review and repression. The constitutional guaranty of free speech carries with it no right to subvert the purposes and destiny of the nation."

While urging that the indictment is insufficient, the defendant does not in any manner particularize the point wherein it is claimed the indictment is defective. It is, however, sufficient to state that the counts in this indictment are similar to those found in numerous Espionage cases, which have gone to conviction and which have withstood similar objections thereto. Each count follows the words of the statute and includes a statement of the facts and circumstances as sufficiently identify the acts charged as an offense against the Government.

As stated by Circuit Judge Morrow in the case

of *Rhuberg vs. U. S.*, 255 Fed. 865: "This is all that is required."

In the Espionage Case of *U. S. vs. Prieth,* 251 Fed. 946, the court said:

> "All that was required was that the indictment should acquaint the defendants with the nature and cause of the accusation; set forth the charge with sufficient definiteness to enable them to make their defense and to avail themselves of the record of the conviction or acquittal for their protection against further prosecution and to inform the court of the facts charged so that it may decide as to their sufficiency in law to support a conviction, if one should be had, and that the elements of the offense should be set forth with reasonable particularity of time, place and circumstances."

Applying these tests to this indictment, that as to the formal requisites, it surely is sufficient.

We also submit the following Espionage cases which have gone to the Circuit Court of Appeals, wherein indictments, similar to that in this case, were found sufficient:

Krafft vs. U. S., 249 Fed. 919.

O'Hare vs. U. S., 255 Fed, 538.
Doe vs. U. S., 253 Fed. 903.
Kirchner vs. U. S., 255 Fed. 301.
Rhuberg vs. U. S., 255 Fed. 865.
Shaffer vs. U. S., 255 Fed. 886.
Coldwell vs. U. S., 256 Fed. 805.
Heynacher vs. U. S., 257 Fed. 61.
Herman vs. U. S., 257 Fed. 601.
Wells vs. U. S., 257 Fed. 605.
Shidler vs. U. S., 257 Fed. 620.
Schumann vs. U. S., 258 Fed. 233.
Goldstein (9 C. C. A. decided 6-26-19).

The defendant in his brief, discussing this assignment, not only criticises the form of the indictment, but the argument is apparently extended to a challenge of the criminal character of the acts charged in the indictment.

In the case of *Krafft vs. U. S.*, 249 Fed. 919, affirmed in 247 U. S. 520, the Circuit Court of Appeals for the Third Circuit approved the holding of the lower court that there were but two questions involved in espionage cases, both of which were jury questions: the first question being whether or not the defendant spoke the words which are alleged in the indictment and with which he is charged with speaking, and the sec-

ond being whether, if he did, what was the intention in his mind in speaking them.

Again in the case of *Doe vs. U. S.*, 253 Fed. 903, the Circuit Court of Appeals for the Eighth Circuit held that the offenses charged in these espionage cases are clearly statutory, and that if the indictment charges the offense in the language of the statute together with such facts as to clearly apprise the defendant of what he must be prepared to meet and to what extent he may plead a formal acquittal or conviction, that it would be sufficient.

In the case of *O'Hare vs. U. S.*, 253 Fed. 538, the Court in sustaining the sufficiency of an indictment charging the offense of obstructing the recruiting and enlistment service of the United States, stated as follows:

> "By counsel ignoring the first part of the count, which coupled with those following is equivalent to the charge that the defendant did not merely attempt to obstruct, but actually did so and wilfully, the final averment of intent may be taken as an additional elaboration of the element of wilfulness."

In the case of *Schaffer vs. U. S.*, 255 Fed. 886, Circuit Judge Gilbert held:

"The plaintiff in error contends that the publication complained of contains no false statement, but only the opinion of the author of the book that patriotism is identical with murder and the spirit of the devil, that war is a crime and the argument that it was yet to be proved whether Germany had any intention or desire of attacking the United States. It is true that disapproval of war and the advocacy of peace are not crimes under the Espionage Act; but the question here is not whether the publication contained expressions only of opinion, and not statements of fact, but it is whether the natural and probable tendency and effect of the words quoted therefrom are such as are calculated to produce the result condemned by the statute. * * * * *

We think it should not be said as a matter of law that the reasonable and natural effect of the language quoted from the publication was not to obstruct—that is, not to impede, retard, or render more difficult—the recruiting or enlistment service and thus to injure

the service of the U. S. Printed matter may tend to obstruct the recruiting and enlistment service, even if it contains no mention of recruiting or enlistment, and no reference to the military service of the U. S. It is sufficient if the words used and disseminated are adapted to produce the result condemned by statute.

The service may be obstructed by attacking the justice of the cause for which the war is waged and by undermining the spirit of loyalty which inspires men to enlist or to register for conscription in the service of their country. The great inspiration for entering into such service is patriotism, the love of country. To teach that patriotism is murder and the spirit of the devil, etc., is to weaken patriotism and the purpose to enlist or to render military service in the war."

In the case of *Kirchner vs. U. S.*, 255 Fed. 301, the Court held:

"The first contention on the demurrer is based on the supposition that the indictment charges the defendant merely with the utterance of opinions. The indictment alleges

that the defendant had said in substance that the U. S. Government in the prosecution of the war was corrupt and controlled by the moneyed interests. Certainly such an assertion could be made and intended as a statement of fact. * * * * The indictment contains at least one clear statement of fact alleged to be false; the remaining statements alleged to have been made may properly be treated as surplusage."

In the case of *Coldwell vs. U.S.*, 256 Fed. 808, the Court held:

"The Court submitted to the jury the determination of whether the words were spoken substantially as alleged, and, if so, whether they were adapted to create the offenses charged, and also the intent with which they were uttered; and we must accept the verdict of the jury in favor of the government on these issues as fully sustained by the evidence, provided the allegations in the indictment were sufficient in law to sustain it.

* * * *

"The time and place when and where the

alleged statements were made by the defendant, and all the surrounding circumstances, could be considered by the jury, and were properly for their consideration, in arriving at a conclusion in regard to whether their utterance constituted the attempt charged as well as the intent of the defendant in making them. The language attributed to the defendant does not call for any legal or expert knowledge in its interpretation, and the jury was as well able to judge of its adaptability to produce the results alleged as the court.

* * * *

"Whether the statements alleged to have been made constituted, under the circumstances, an attempt 'to cause insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces of the United States', or an obstruction of 'the recruiting or enlistment service of the United States to the injury of the service or of the United States', were questions for the jury."

In the case of *Haynacker vs. U. S.*, 257 Fed. 61, the court affirmed the judgment of conviction for causing and attempting to cause disloyalty in the military forces of the United

States and for obstructing the recruiting and enlistment service of the United States, based upon the following utterances made to a young man eligible to enlistment, which the Court held sufficient under the statute:

> "That he should not enlist, that the present war was all foolishness and (a vulgar word which need not be repeated), and that my talk of enlisting was all nonsense; that the war was for the big bugs in Wall Street; that it was all foolishness to send our boys over there to get killed by the thousands, all for the sake of Wall Street; that he should not go to war until he had to."

In the case of *Shidler vs. U. S.*, 257 Fed. 629, Circuit Judge Hunt said:

> "With respect to the fourth count, it is argued that the statements alleged could be construed as the honest expression of an individual citizen or a reckless statement of opinion. Assuming for the purposes of argument, that a man might express such opinions and still be loyal to his country, still if wilfully and with evil mind he uttered the language with the intention of bringing about

insubordination, disloyalty and refusal of duty in the military forces of the land, he has violated the law and is subject to punishment and should be brought to trial. His acts, his speech, and the state of his mind become matters for the consideration by a jury under proper instructions upon the law of attempt to commit a crime."

In the case of *Goldstein vs. U. S.*, decided May 26, 1919, Circuit Judge Hunt said:

"Enacted as the statute was while the country was at war, the evident, underlying purpose of its language was to prevent any wilful attempt to engender feelings of lack of fidelity to the United States among the military or naval forces or any attempt made with evil mind to cause any disobedience to lawful authority in the military or naval forces; and the statute should always be read in the light of the purpose of its enactment.

* * * *

"We believe that the issues under the counts were properly for the jury."

Under the authorities above cited, we earnest-

ly contend that there are but two questions involved in this case: (1) Whether or not the defendant spoke the words which are alleged in the indictment, and (2) if he did, what was the intention in his mind in speaking them. We do not think it will be seriously urged that the defendant did not make the statements attributed to him in the indictment. In fact, it is practically conceded in defendant's brief and, therefore, there is but one question left for determination, and that is whether or not the defendant in saying these things, intended to violate the law in the manner charged. This, of course, is clearly a question of fact for the jury. Whether or not the evidence was of such a substantial character as to support the verdict of the jury is not a proper matter for consideration under this assignment, but will be treated fully under the succeeding assignment.

II.

MOTION FOR DIRECTED VERDICT.

This motion presents but one question, and that is whether or not there was any substantial evidence, at the trial, of the guilt of the defendant. It must be manifest from defendant's argu-

ment that counsel places undue emphasis, so far as this appeal is concerned, upon the weight of the testimony and not the sufficiency thereof.

No citations are necessary that courts of review will not undertake to set aside the verdict of the jury because they might possibly come to a different conclusion, nor will they seek to substitute their judgment in place of the jury's, but will simply consider the question whether there was *any* substantial evidence offered at the trial to support the verdict that the jury did find. As disclosed by the authorities hereinbefore cited, the question of intent is a vital factor in the case. Counsel claims that the defendant had no such wilful intent as attributed to him in the indictment, and asserts that the weight of the testimony indicated that at the time of making the utterances charged in the indictment, he was "heckled" in the making of them while in a drunken stupor. Clearly if this defense was presented to the jury under appropriate instruction, no error could be urged if the jury in its determination found the situation to be the contrary to that insisted upon by defendant. In other words, it is our contention that this court cannot under this assignment seek to ascertain whether the jury

should have found a verdict of guilty but is only concerned with the fact, whether there was *any* stantial evidence, at all, introduced at the trial that would support its verdict.

The defendant practically concedes that the defendant made the statements with which he stands accused, but urges that the jury was not warranted in attributing to him the wilful intent of (1) inciting, provoking and encouraging resistance to the United States, and promoting the cause of its enemies; nor, the wilful intent of (2) supporting and favoring the cause of Germany and opposing the cause of the United States therein. We set out the specific intents, for it is with them only that we are concerned, as the jury acquitted the defendant upon the other offenses involving other and different intents. The court should, therefore, not be confused by the defendant's argument as to the impossibility of the defendant intending to obstruct the recruiting or enlistment service of the United States or the impossibility of his causing or attempting to cause insubordination, disloyalty, mutiny and refusal of duty in the military forces of the United States.

But we do assert that so far as the intents in-

volved in Counts Three and Four of the indictment are concerned, and upon which the jury returned a verdict of "guilty," that there was sufficient evidence to support that verdict, irrespective of any argument whether or not the weight of the evidence was in accord with that verdict. Under our system of jurisprudence the province of the jury is supreme. It has the exclusive jurisdiction to determine questions of fact and to it alone is given the duty of measuring the weight and appraising the value of the testimony. So long, therefore, as the jury does not act arbitrarily and without justification, there can be no ground for error under this assignment. Of course, the verdict is not agreeable to the views entertained by the defendant, but that naturally is to be expected.

Bearing in mind, therefore, that the defendant practically concedes the making of these utterances, though urging the lack of sufficient proof upon the question of wilful intent, we, therefore, submit a resume of the testimony upon this specific issue, to-wit: intent. This issue clearly presents a question of fact for the determination of the jury alone (*Coldwell vs. U. S., supra.*) We have every assurance that the following resume

will disclose sufficient facts and circumstances from which the jury could reasonably and logically come to the conclusion that it did. In any event, the record shows *some* substantial evidence upon this specific issue, to-wit: intent, that is sufficient to support the verdict. That being so, no legal reason can be advanced by defendant why this verdict should be disturbed, so far as this assignment is concerned.

JUDSON A. MEADE (Trans. P. 67) age 45; a resident of Los Angeles, California, and engaged in the oil business, testified that on October 8th, 1918, he was on train No. 54, enroute to Portland and to the oil fields in Northern Canada. That prior to that time he had never met the defendant, Albers, Tichenor, Kinney, Bendixen, or Gaumaunt; that about 8 o'clock in the evening of October 8th, he saw Albers and Gaumaunt in the smoking compartment; that they were engaged in conversation during the course of which the witness heard Albers make the remarks set out in the record; that Albers made these remarks very emphatically and with gesticulations; that Albers' condition was that of a man who had been drinking but not to such an extent that it impaired the possession of his full mental facul-

ties; that there was nothing about his actions that did not indicate that Albers had full possession of all his faculties.

FRANK B. TICHENOR (81) resident of Portland, Oregon and deputy United States Marshal for Oregon, boarded train No. 54 at Grants Pass, enroute to Roseburg, where he had warrants to serve; that he had gone to Grants Pass to serve subpoenas issued out of Portland; that he testified that he did not know Albers was on that train, had never met him and knew him only by reputation; that he had never met any of the other witnesses prior to that time; that after he had his dinner on the train he went into the smoking room, where he saw Albers and Gaumaunt engaged in conversation. That noticing a pint bottle of liquor in the room, he suggested that it be put away. After leaving the smoking car, Gaumaunt intercepted him and wanted to know if he (Tichenor) was an officer, whereupon being advised that he was, Gaumaunt told him that there was a pro-German in that room and that because of his pro-German statements he was likely to be beaten up. That witness told him he could accomplish nothing by beating Albers up, but that the best way would be to find out what

Albers was saying and then to report it. That later the witness overheard the defendant make certain of the remarks testified to by the other witnesses. That Albers' condition at the time witness saw him was that of a man who had been drinking, but that he spoke very distinctly and was emphatic in his remarks.

L. W. KINNEY (89), aged 48 a resident of Portland, Oregon, and engaged in the merchandise brokerage business, testified that he was on train No. 54, leaving San Francisco, October 7th, enroute to Portland; that up to that time he had never met defendant Albers or any of the other witnesses, nor did he know they were going to be on the train; that shortly after the train left Medford, he went into the smoking room and saw Gaumaunt with Albers and entered into the conversation at which time Albers made a number of decidedly pro-German statements which are set out in the record; that in making some of the remarks Albers was very emphatic, pounding his left hand on his knee; that the witness most certainly thought Albers had possession of his faculties and seemed to know what he was saying and doing.

L. E. GAUMAUNT (100), age 30 years and

engaged in the automobile business at Kent, Washington, and also a special Deputy Sheriff for King County, Washington, testified that he was aboard train No. 54 on October 8th, enroute to Portland and Kent, Washington, his home; that he did not know and had not met the defendant Albers or any of the other witnesses. That prior to his conversation with the defendant, he had not discussed Albers with anyone; that he went into the smoking room about eight in the evening of October 8th, when he noticed the defendant talking with Mr. Kinney and in the course of that conversation and in subsequent conversations defendant made a number of the remarks set out in the indictment; that while the defendant had been drinking, his speech was plain and that he expressed himself vigorously, at times pounding his knee.

E. C. BENDIXEN (116), age 31, a resident of Portland and employed as Auditor and Inspector of the Aetna Life Insurance Company, Casualty Department, testified that on October 8, 1918, he was at Grants Pass on a matter of business; that he boarded train No. 54 at Grants Pass at 6:30 P. M.; at that time he was not acquainted with the defendant or any of the witnesses with

the exception of Mr. Tichenor, whom he knew by sight, though he had never met him. That he observed the defendant in the smoking compartment, but did not talk with him until after Mr. Tichenor asked him to find out if the defendant was Mr. Henry Albers. That after some hesitation, he agreed to make inquiry; that thereupon he went into the smoking room and introduced himself as Erwin Bendixen and said that probably the defendant knew his Uncle Peter Bendixen; that the conversation was carried on in German; that the defendant told him he knew his uncle and that thereupon witness warned the defendant against making seditious remarks and urged him not to do so; that in spite of the warning, the defendant persisted in making the remarks set out in the indictment; that the defendant was emphatic in his talk; understood the questions put to him by the witness and answered clearly and distinctly.

D. Y. ALLISON (251), testified that he is in the employ of the Southern Pacific Railroad Company as brakeman; that he was working in that capacity on train No. 54 on October 8th, 1918; that he knows the defendant by sight; that he paid no particular attention to defendant,

except on one occasion while walking back to the rear of the train he saw the defendant and several gentlemen in conversation in the smoking room; that everything seemed to be all right; that on another occasion when the train was leaving Medford, he passed by the smoking room and heard loud talking; that he looked in and saw the defendant; that while he considered Albers had been drinking, he did not consider him intoxicated.

During the course of the Government's case the defendant's counsel made the following statement:

> "We have never doubted that this man was strongly pro-German before we entered the war. There will be no dispute about that here." (137).

The above testimony relates directly to the exact charge contained in the indictment. The following witnesses were called to prove the bent of mind of the defendant, from which the jury might ascertain the *intent* of the defendant in making the statements charged—that is, the intents as charged in Counts 3 and 4 of the indictment.

OLGA GOMES (130), testified that she resided at San Francisco, California; that she was employed as a manicurist at the Sutter Hotel Barber Shop, where she met the defendant Henry Albers; that he was introduced to her in April of 1918 by a Mr. Jack O'Neill, a friend of the defendant. She had previously advised Mr. O'Neill that she had lived at Milwaukie, Oregon, where the defendant has his home. On the occasion of their first meeting, while manicuring Mr. Albers, they discussed their mutual friends at Milwaukie, Oregon, and that he suddenly changed his conversation when some one in the Barber Shop discussed the war. Upon this occasion he told her very distinctly:

> That he was a Kaiser man from head to foot.

The witness dissuaded him from further discussion upon that subject and that immediately after manicuring him, she having previously been invited by Mr. O'Neill to accompany him, a Miss Wade and the defendant, on an auto trip, started on this trip. She sat alongside of the defendant in the taxicab while Mr. O'Neill was with Miss Wade on the two little seats in front. They rode toward Stanford University at Palo

Alto. That during the ride she remembered distinctly the following remarks made by the defendant:

> "I am a millionaire and I will spend every cent I have to help Germany win the war."

That he thereupon pounded on his knee and made this remark:

> "Deutschland uber alles."

That he was warned by Miss Wade to shut up; that they might be interned. Thereupon the defendant said:

> "I am a spy and I am ready to be shot right now for Germany."

> "There will be a revolution in the United States."

The witness states that she remembers these remarks so well because of the impression they made upon her; that they worried her so much that she finally caused the matter to be reported to the United States Attorney at San Francisco.

HENRY CERRANO (136), a resident of Portland, Oregon, a naturalized citizen of Italian descent, tesified that in October, 1915, he was

employed as janitor, cleaning windows, for Albers Brothers, with which firm the defendant, Henry Albers, was connected; that the witness remembers the defendant coming into the office with a German American paper and giving the same to a young man who was working at a typewriting machine, and saying:

> "Look at that paper. See what the German Army is doing. The German Army is doing wonderful, and France and England come very easy;"

that when the defendant left the room, the witness heard him make this statement:

> "One Kaiser, and one God."

N. F. TITUS (139), a resident of Portland, Oregon, testified that while employed with the Columbia Navigation Company, having his headquarters and business office on Albers Dock No. 3, adjoining the mill of Albers Brothers, at Portland, he had occasion to see a good deal of the defendant during the year 1917 and up to about March 1, 1918; that he had a great many conversations with him concerning the war, during the course of which the defendant stated:

That all that appeared in the papers about the atrocities in Belgium were lies; that the press of America was dominated by the English press, and that to get the truth one would have to read the German newspapers.

The defendant further stated in the course of his conversations with the witness, respecting the exchange of notes between the United States and Germany:

That the United States was mislead in their position due to the influence of the British press.

The defendant further stated in comparing our Army with that of the German Army:

That our soldiers were amateurs going up against professionals, and he doubted under the circumstances if we could beat the Germany Army in a thousand years.

That these statements were made in the course of conversations had between witness and the defendant subsequent to our entrance in the war.

G. M. WARDELL (150), testified that about the middle of February, 1918, he saw the defen-

dant at Wheeler, Tillamook County, Oregon; that he heard the defendant make the remark:

> That when the Germans got well organized, that with their submarines there would be no chance for any boats to go across, and that he hoped they would blow every British ship out of the water.

DAVID McKINNON (153), Superintendent of Construction of the Standifer Steel Company, at Vancouver, Washington, testified that he was acquainted with the defendant, and that he met him in San Francisco after the World War, some time in September or October or November of 1914; that the defendant, himself, brought up the subject of the war, asking him:

> "What do you think of our British cousins?"

When witness told the defendant that they were no cousins of his, the defendant made the following statement:

> "Never mind, before we get through with them *we* will kill every man, woman and child in England."

Witness is sure that the defendant used the word "we."

In rebuttal, after the proper impeaching questions had been asked the defendant, the following testimony was elicited:

FRED HAINES (253), who conducts a store at Harney, Oregon, testified that on or about the middle of September, 1916, he was at Hot Lake, Oregon, where he had a conversation with the defendant, at which time the defendant told him that he had been to Baltimore when the German submarine "Deutchland" came in and that he met the captain, Captain Koening, and some of the crew.

HORACE A. CUSHING (254), Manager of the Lily Seed Company of Portland, testified that shortly after Germany declared war against France and Great Britain, the defendant offered to bet witness $1,000 to 50 cents that the Kaiser could lick the world.

JOHN H. NOYES (254), the Manager of the Grain Department of the Globe Grain & Milling Company, Portland, Oregon, testified that in November, 1914, the defendant made a bet of $10.00 with the witness, that the German Army would be in London in sixty days; that in December, 1915, the defendant bet $10.00 with the witness

that the war would be over April 1, 1916. Mr. Albers lost, of course. One of the bets was paid.

It must already appear quite evident from a perusal of the above, that there was some substantial evidence introduced at the trial tending to prove the criminal intent found by the jury by its verdict of guilty. As heretofore stated, the utterance of the words by the defendant was admitted. It was urged in defense, however, that the defendant was "heckled" in making these utterances, while in a drunken stupor. That was clearly a question of fact for the determination of the jury. There was some substantial evidence tending to prove that while the defendant had been drinking, he was in full possession of all his mental capacities and was perfectly conscious of what he was saying and doing, as evidenced by the emphasis which he placed upon certain statements; by the bitterness of his feelings against this country; by the quick and responsive answers to the questions put to him; by his wilful disregard of the warnings given to him; all this tending to disprove the defendant's defense of unconscious offending and tending to prove that the statements were deliberately and intentionally made, al-

though prompted undoubtedly by a spirit of boastfulness and braggadocio so characteristic of the former Imperial German subjects.

We, therefore, contend that taking into consideration the evidence of Miss Gomes, Mr. McKinnon, Mr. Wardell, Mr. Cerrano and others, who testified as to similar statements on other occasions, that the evidence is sufficient to support the conclusion reached by the jury that the defendant said these things with the intent to support and favor the cause of Germany and oppose the cause of the United States and with the intent to incite, provoke and encourage resistance to the United States and promote the cause of its enemies.

It is the plea of counsel that the Court should have directed a verdict in favor of the defendant. We feel that under the circumstances as disclosed by the record, the Court had no other alternative but to present the case, under proper instructions, to the jury for its determination upon the question of intent. It seems presumptuous on the part of counsel to urge that in the face of this record, the court was compelled to take this case away from the jury, particularly when the testimony upon the issue of intent was

so conflicting. It, therefore, became the clear duty of the Court to present the matter to the jury.

It is well established that where any question of fact exists, or even where different inferences may be drawn from circumstances shown without contradiction, the case is clearly one for the exclusive determination by the jury. (*Hudson & M. R. Co., v. Iorio,* 239 Fed. 855). The rule is well stated in the case of *McLaughlin v. Joseph Horne Co.,* 206 Fed. 246 to be:

> "It is sometimes the duty of the judge to direct a verdict for one party or the other, but he has no power to do so where the testimony is oral and conflicting, or where, although the facts are not directly disputed, it is uncertain what inferences should be drawn from them. Inferences of fact are themselves facts and ordinarily the jury must draw them and not the judge."

Where there is any dispute as to material facts, it has been held time and time again that the appellate court will not weigh the conflicting evidence or determine what it thinks to be the weight of the evidence appearing in the record.

In the recent case of *Frain v. U. S.*, 255 Fed. 30, where a judgment for conviction on the charge of conspiring to resist the draft was affirmed, the Circuit Court, in disposing of a similar species of assignment as is here urged rendered the following opinion thereon, which is so clearly in point that we maintain it is conclusive so far as this assignment is concerned:

> "Plaintiffs in error are really objecting to the weight of the evidence and appealing to this court to override the jury's verdict. * * * We are not permitted to be concerned with that matter. Appellate courts, unless given power by statute, do not sit to correct the possible errors of the jury, but those of the court. While it is the jury's duty to take the law from the court, and to apply that law to the facts as they find them, and it is the court's duty to see that there is some evidence tending to prove every element of the crime alleged, the jury's supremacy as to facts, including the inferences of fact drawn from proven phenomena, is unquestioned."

III.

RE ADMISSIBILITY OF EVIDENCE

(A) It is contended that the court erred in allowing the Government to introduce in evidence, for the purpose of showing intent, statements made by the defendant at other times than upon the occasion specified in the indictment. The defendant's counsel in his brief states:

> "The statments of these witnesses admitted in evidence tended to produce in the minds of the jury the idea that plaintiff in error harbored a brutal, bloodthirsty hatred of England and France, without having any tendency, whatever, to establish in the least degree his attitude as between Germany and the United States in the war between them. * * *"

This objection is particularly directed against the testimony of McKinnon and Cerrano relative to statements made by defendant prior to our entrance into the war.

A similar objection, based upon a similar line of reasoning as advanced in defendant's brief, was made in the case of *Rhuberg v. U. S.* (255 Fed. 865), arising in this District, where the defendant Julius Rhuberg, in many respects a counter-part of Henry Albers, was convicted for

violation of the Espionage Act, and his conviction affirmed. There too, Julius Rhuberg, like Henry Albers, German born, enriched by the bounty of this country, made statements in 1914 and 1915, evincing a bitter hatred against England. There too, these statements were admitted in evidence by the court. Answering this objection, Circuit Judge Morrow said:

> "The evidence of statements of the defendant made prior to the entry of the United States into the war, thus restricted and limited by the court, was clearly admissible under a well known rule of evidence upon that subject."

It is further urged that the testimony of Cerrano and McKinnon merely tended to show a bitter hatred against England without in any way tending to show any disloyalty to America as between Germany and America. It cannot, however, be disputed but that this hatred toward England was expressed after war was in progress between England and Germany and, therefore, such testimony tended to show full sympathy with Germany. This line of testimony is identical with that offered in evidence in the

Rhuberg case and, therefore, these cases are in every respect parallel so far as this assignment is concerned. As in the Rhuberg case, this testimony was offered for the purpose of ascertaining the bent of the mind of the defendant, or his attitude toward this Government, or toward Germany. This case is no exception to the general rule as announced and promulgated in the Rhuberg case, for where it appears that an individual charged with an offense under this statute was in full sympathy with Germany prior to the time when this country entered into the war with Germany, that fact itself would be a matter to be taken into consideration in order to determine his attitude of mind at the present time. There clearly was no error in the admission of this evidence.

Following the case of *Rhuberg v. U. S.* supra, this court had occasion to pass upon similar assignments in the case of *Shilder v. U. S.* (257 Fed. 620) and *Herman v. U. S.* (257 Fed. 601).

In the case of *Shilder v. U. S.* supra, Circuit Judge Hunt, in disposing of this assignment, stated as follows:

> "Certain statements made by the defendant prior to the declaration of war were

admitted over the objection of defendant's counsel. The Court, however, in admitting such statements, expressly ruled that they were before the jury solely to enable it to determine what the defendant's state of mind was at the time he uttered the statements charged in the indictment. We find no error in the ruling."

At the time the testimony of McKinnon and Cerrano was offered by the Government, the Court expressly limited and qualified the effect and so likewise instructed the jury. (Trans. P. 308).

It will thus be seen by reading these instructions that the Court carefully instructed the jury to what extent it might regard this testimony; that this testimony might be considered by the jury for only one purpose, to-wit: to determine the intent actuating the mind of the defendant in doing the things charged against him, if the jury should first be satisfied beyond a reasonable doubt that he had wilfully utttered the things charged in the indictment.

That the trial court was correct in its ruling is supported by an overwhelming weight of

authorities which are unnecessary to cite, in view of the attitude of this court upon the competency of this testimony as disclosed by the recent cases of *Rhuberg v. U. S.*, supra; *Shilder v. U. S.*, supra; and *Herman v. U. S.*, supra.

(B) It is further contended that the court erred in admitting in evidence the testimony of the witness E. C. Bendixen, upon the ground that the statements alleged to have been made by the defendant to Bendixen being in German, that such testimony constituted a variance from the charge in the indictment. In support of his contention, defendant cites a number of cases, all, however, involving either the charge of slander or libel. In brief, the defendant contends that the pleading should have set out the statement made to Bendixen in the German language, together with translation of their meaning into the English language and the pleading having failed to do so, it was insufficient to authorize the admission of Bendixen's evidence.

It ought to be a sufficient answer to say that the Espionage Act does not purport to set out an offense of libel or slander and, therefore, indictments charging violations of the Espionage Act are not required to come up to the standard

prescribed for indictments or complaints charging libel or slander.

Libel and slander are based upon the publication and utterance of the *particular words which in themselves* constitute the offense. The offenses denounced by the Espionage Act, are not confined to *writings* or *words,* as in libel and slander, but may be committed by other means, as for instance: the act ofobstructing the recruiting; the act of inciting insubordination; the act of supporting the cause of Germany, etc. The recital of the *words* in an Espionage indictment are merely for the purpose of identifying and particularizing the charge that the defendant is required to meet, and in no sense are the words themselves the specific offenses condemned by the statute as they are in the cases of libel or slander. The distinction between libel and slander on the one hand, and the offences denounced by the Espionage Act, seems to us so plain that we feel justified in concluding the discussion with the opinion of the trial Judge upon this question when it was submitted to him upon the motion to set aside the verdict. This is so clearly convincing and conclusive that further discussion would be unwarranted:

"The court passed upon that question at the time it was raised during the trial, and it based its decision entirely upon the statute itself, which declared that whosoever shall by word or act, transgress this law shall be guilty of an offense. Construing the language 'word or act,' 'word,' of course, includes speech. If that speech be delivered in any language, it is a violation of the law if it contravenes this statute. I need not dwell upon that. It is, however, urged that the language should have been set forth in the indictment in the German, and then the indictment should have explained that (translating into English) it means so and so.

"A defendant is entitled at all times to have the offense charged in such terms, and by such particularity, that he may be able to concert his defense and put the whole evidence before the court and the jury.

"Now, this indictment states in specific terms what the defendant said, and undoubtedly, to my mind, it gave him full and particular notice of the charge made against him, and there was nothing left that would operate to deter him in any way from pre-

paring himself for the defense in this case. When all is considered, I do not think that he was misled in any way by the indictment, but that he was fully warned as to what he would be required to meet when it came to the trial. The proof did show that part of this language was spoken in German, and part of it was spoken in English. I do not believe that, because it was spoken in German, that was a variation or a departure that would require this court to set aside the verdict in this case."

Moreover, it is elementary that a variance of this kind cannot prejudice the defendant if the allegations in the indictment and the proof so correspond that the defendant is informed of the charge and can protect himself from a second prosecution for the same offense. It will not be argued that the defendant was, or could possibly have been, misled by the nature of the proof.

Bennett v. U. S., 227 U. S. 333.

Bennett v. U. S., 194 Fed. 630.

Jones v. U. S., 179 Fed. 584.

As stated by District Judge Brown, in his

general charge to the court in the case of *U. S. v Coldwell* (Bulletin 158), which went to conviction and was affirmed in 256 Fed. 805:

> "Mere slight variations of expression, as I have said, would not constitute a fatal variance. No variance would be regarded as material which did not prejudice the defendant in apprising him of the offense, or change the character of the charge against him."

(C) It is further urged that the court erred in admitting in evidence the testimony of Eva T. Bendixen, offered by the Government in rebuttal (Assignment 12, Trans. P. 51). It is contended that this evidence was not proper rebuttal and was not competent for the purpose of impeachment.

Attention is called to the testimony of defendant's witness WESLEY NIPPOLT (Trans. P. 158), who testified he visited the home of Mr. and Mrs. E. C. Bendixen on October 10, 1918, at which time he claims Mr. Bendixen had made the statement that he had fixed his Uncle's stock plenty, and that he considered the entrapping of Henry Albers as his bit in the war. Upon cross-

examination Mr. Nippolt stated that he "guessed" Mrs. Bendixen was present when her husband made this alleged statement.

Certainly the Government was entitled to rebut the testimony of the defendant's witness Nippolt as to what transpired when Mr. Nippolt made this "opportune visit." There was nothing in her evidence to warrant calling Mrs. Bendixen in support of the Government's direct case, as contended by the defendant. It had no reference to the case in chief, and its only relevancy was due to the fact that the defendant, himself, volunteered the testimony of Mr. Nippolt by way of impeaching the Government's witness E. C. Bendixen, who had previously denied making any such statement as Mr. Nippolt claimed. When, however, Mr. Nippolt stated that Mrs. Bendixen was present when this alleged statement was made, not to have called her in rebuttal would have been tantamount to an adimission that such statements had in fact been heard by her. We cannot understand how counsel can maintain with any sincerity, that we were barred from this testimony.

It is further urged that the Government was

precluded from questioning Mrs. Bendixen further, after she had denied in toto what Mr. Nippolt claimed had been said in her presence. Upon examining the record (Trans. P. 248) the court will readily see that the testimony now objected to was merely offered by way of explanation as to what conversation was actually had between Mr. Nippolt and Mr. Bendixen concerning the very subject matter about which Mr. Nippolt was asked, and how such conversation came about. This certainly cannot be claimed as an attempt to bolster up the testimony of Mr. Bendixen when it had absolutely no reference to the Government's case in chief, and had no direct connection, whatsoever, with the testimony of the Government's witness as to what took place on train No. 54. This testimony was brought about through the act of the defendant, himself, in presenting as one of his star witnesses a man who claimed to have elicited certain alleged damaging "confessions" from Mr. E. C. Bendixen, in the presence of his wife, when in truth and in fact no such alleged "confessions" had been made. The court properly allowed Mrs. Bendixen to explain the presence of Mr. Nippolt and how the conversation that did take place

came about. In any event, this testimony, as counsel admits, was of no great importance and could in no wise have prejudiced the case of the defendant so far as the issues involved were concerned. The lower court is vested with sufficient discretion to control and limit the scope of the examination.

Chicago, M. & St. P. Railroad Co. v. Chamberlin, 253 Fed. 429).

(D) It is further contended that the court erred in admitttng in evidence the testimony of HORACE A. CUSHING (Trans. P. 254) and JOHN NOYES (Trans. P. 254), relative to certain bets which had been made between them and the defendant, Henry Albers, as to the outcome of the war. Though not seriously urged, the defendant maintains that this was an attempt to impeach the defendant upon immaterial matter.

The record will show that while Henry Albers was on the stand in his defense, he offered evidence tending to prove his loyalty to this country even prior to our entrance into the war, and related at some length the things he had done for the Government, while at the same time

protesting his aversion to German militarism and his sympathy for the allied cause at the time Germany invaded Belgium. (Trans. P. 231).

Upon cross-examination his attention was particularly called to the bets made with Mr. Cushing and with Mr. Noyes, and the usual and proper impeaching questions were propounded to him. He positively stated that he had made no bets about the outcome of the war. (Trans. P. 245).

It was, therefore, proper for the Government, for the purpose of impeaching and attacking the credibility of the defendant, Henry Albers, as a witness upon a matter vitally material to the issue in the case, to-wit: the loyalty of Henry Albers, to call Mr. Cushing and Mr. Noyes in rebuttal and to disprove the testimony given by Mr Albers, concerning which his attention had been specifically called.

In the case of *Heynacher v. U. S.* (257 Fed. 261), an Espionage case, the Government introduced a letter written by the defendant to the President of the German American Alliance of his state, enclosing a newspaper clipping telling

of the escape of a German soldier who told of the brutality of the German officers, conditions behind the German lines, etc., with the defendant's comment "What kind of swine is this?" The Circuit Court held that this letter was properly admissible to rebut the effect of defendant's evidence that he was a member of the Red Cross and gave free posting to army and navy advertisements on his bill boards, etc.; that it tended to show that the public manifestations of loyalty on which the accused relied should not receive the full consideration he claimed for them.

The similarity of these cases is so striking, that we esteem further discussion upon this point unnecessary.

IV.
FAILURE TO GIVE REQUESTED INSTRUCTIONS

(A) It is contended by the defendant that the court erred in failing to give the following requested instructions:

> "If the defendant was intoxicated at the time of making any of the statements set forth in Counts 1, 2, 3 and 4 of the indictment, to such an extent that he could not

deliberate upon or understand what he said, or have an intention to say what he did, you should find the defendant not guilty upon each of said Counts 1, 2, 3 and 4 of the indictment.

"While voluntary intoxication is no excuse or palliation for any crime actually committed, yet if upon the whole evidence in this case, by reason of defendant's intoxication (if you find he was intoxicated at the time), you have such reasonable doubt whether at the time of the utterance of the alleged language (if you find from the evidence defendant did utter said language) that defendant did not have sufficient mental capacity to appreciate and understand the meaning of said language and the use to which it was made; that there was an absence of purpose, motives or intent on his part to violate the Espionage Act at said time, then you cannot find him guilty upon Counts 1, 2, 3 and 4, although such inability and lack of intent was the result of intoxication."

(Assignment 20. Trans. P. 54).

"If the jury finds that the defendant

made the statements alleged in Counts 1, 2, 3 and 4 of the indictment, and that said statements were made as the result of sudden anger and without deliberation, you should find the defendant not guilty upon all of said Counts 1, 2, 3 and 4."

(Assignment 21. Trans. P. 55).

The court had previously instructed the jury upon the issue of drunkenness, thus raised by the defendant, as follows:

"Intent is an essential element in the perpetration of each of the four offenses charged against the defendant in these first four counts of the indictment. If the intent is absent, the defendant cannot be held accountable for what he is alleged to have done. Drunkenness is no excuse for the commission of a criminal offense, yet while this is the law, it is also the law that, where a specific intent is necessary to be proved before a conviction can he had, it is competent to show that the accused was at the time wholly incapable of forming such intent, whether from intoxication or otherwise. In other words, it is a proper defense to show that the

accused was intoxicated to such a degree as rendered him incapable of entertaining the specific intent essential to the commission of the crime charged.

"I therefore instruct you, gentlemen of the jury, that, if the defendant was intoxicated at the time of making any of these statements which are set forth in Counts 1, 2, 3 and 4, to such an extent that he could not deliberate upon or understand what he said, or form an intention to say what he did, your verdict should be not guilty. Otherwise, such a conclusion would not necessarily follow.

"This, as I have indicated, pertains to the first four counts in the indictment.

"It is common knowledge, however, that a person who is much intoxicated may nevertheless be capable of understanding and intending to utter the things that he is pleased to speak. And, as I have advised you, evidence of drunkenness is admissible solely with reference to the question of intent. The weight to be given it is a matter for the jury to determine, and it should be received with

of intoxication from the defendant to the Government, we do not believe it to be the law. It is not the law in the State of Oregon, as admitted by the defendant in his brief, and no Federal cases are cited in support of any such doctrine as advanced by the defendant.

It is elementary that intoxication is no excuse for the commission of a criminal offense, but where a specific intent is an essential ingredient of the crime it is proper for the accused to show that he was too intoxicated to be capable of forming such an intent. It does not therefore follow, that, because the jury must find the necessary intent beyond a reasonable doubt, that the Government must also satisfy the jury beyond a reasonable doubt that the defendant was not sufficiently intoxicated to be incapable of forming that intent. This was clearly a matter of defense, to which appropriate attention was called by the court. The court therefore properly refused to give the instruction in the language requested by the defendant, and more than sufficiently safeguarded his rights in the general charge as indicated above.

(*O'Hare v. U. S.*, supra.)

In the case of *United States v. Buessel* (Bul-

letin 131), wherein the defendant was charged, as in this case, with the offense of supporting and favoring the cause of Germany and opposing the cause of the United States, in violation of the Espionage Act, Judge Howe gave the following instruction touching upon the question of intoxication:

> "If the defendnt was intoxicated at the time of making any of the statements to such an extent that he could not deliberate upon or understand what he said or form an intention to say what he did, your verdict should be not guilty as to any statements which he made when in that condition of intoxication. You should bear in mind, however, that a person who is much intoxicated may nevertheless be capable of understanding and intending what he says."

Moreover, there is a familiar legal presumption in every criminal case, with which counsel must undoubtedly be familiar, that a man intends that which he does. This presumption is frequently availed of in Espionage cases, and was fully approved in the case of *Kirchner v. U. S.* (255 Fed. 301). With this presumption

accorded to the Government at the outset in a trial of an Espionage case, it would be highly inconsistent, to say the least, that the Government would, nevertheless, be required to convince the jury beyond a reasonable doubt of the defendant's sobriety.

We therefore submit that the trial court's instruction was in accord with the law of the case, and it was not in error to refuse to give the instruction in the language requested.

(B) It is further urged that the court erred in failing to give the following requested instructions:

> "The mere utterance or use of the words and statements set forth in the several counts of the indictment does not constitute an offense in any of said counts. Before a defendant is guilty of violating the statute by oral statements such statements must be made wilfully and with the specific intent made necessary by the statute, and such words and oral statements must be such that their necessary and legitimate consequence will produce the results forbidden by the statute."

(Assignment 17. Trans. P. 53).

"While it is a rule of law that every person is presumed to intend the necessary and legitimate consequences of what he knowingly does or says, the jury, however, has no right to find a criminal intent from words spoken unless such intent is the necessary and legitimate consequence thereof. A jury has no right to draw an inference from words that do not necessarily and legitimately authorize such inference than to find any other fact without evidence."

(Assignment 18. Trans. P. 53).

In its general charge, the court had previously instructed the jury as follows:

"The criminal intent essential to any violation of the statute means a wicked, evil, or wilful intent to accomplish or produce the results forbidden and made punishable by the statute, and where words only are relied on to establish a violation of the statute they should be closely regarded, as the witnesses testifying that oral statements were made by defendant may have misunderstood what he said, and may have unintentionally alter-

ed a few of the expressions really used giving an effect to the statements completely at variance with what the party really did say."

* * * *

"The law presumes that every man intends the natural consequences of his acts knowingly committed, or his spoken words, or in a case like this in which a specific intent affecting the act is a necessary element of the offense charged, the presumption is not conclusive, but is probatory in character. It is for the consideration of the jury in connection with all the other evidence in the case, considering all the circumstances as you may find them, including the kind of person that made the declaration, the place at which the declarations in this case were made, the persons who were present, and all the circumstances attending them, to the end that you may judge the real intent with which they were made. In a case of this character the jury may find from the facts and circumstances, together with the language used, the intent, even though the intent was not expressed—directly expressed. In other words,

you may infer the intent from the character and the natural, ordinary, necessary consequences of the acts."

(Trans. Pp. 302, 303).

We feel that the court's instructions correctly stated the law, and, while the defendant's requested instruction might have been given, the defendant certainly cannot urge that it was error for the court not to have given the precise language asked for by him, so long as it substantially embraced what he sought.

It is contended, however, that the court should have supplemented its instructions with the warning:

> "That the jury has no right to draw an inference from words that do not necessarily and legitimately authorize such inferences."

The court had already instructed the jury that it could only infer the intent from the character and the natural ordinary, necessary consequences of the act. We think the distinction, if any there be, too narrow and trifling to warrant further discussion.

Moreover, when requested instructions single out a particular fact or matter and emphasize it in such a way as to give improper force and meaning to it in view of all the other facts and all the material issues in the case, they should not be given, for they tend to mislead the jury.

Colburn v. U. S., 223 U. S. 596.
Weddell v. U. S., 213 Fed. 908.

(C) It is also urged that as the evidence showed that the defendant was in an angry frame of mind when making the utterances attributed to him, that the jury should have been reminded thereof and that the court should have given the following instruction, which failing so to do is assigned as error:

> "If the jury finds that the defendant made the statements alleged in Counts 1, 2, 3 and 4 of the indictment, and that said statements were made as the result of sudden anger and without deliberation, you should find the defendant not guilty upon all of said Counts 1, 2, 3 and 4."

(Assignment 21. Trans. P. 55).

As a matter of fact, there was nothing that

transpired at the trial, nor discernible from the testimony, that would warrant the requested instruction touching upon the angry frame of mind of the defendant, when making the statements charged in the indictment. The defendant when he spoke these words was on the train, coming from California, and nothing occurred that could arouse his sudden anger or passion. The conversation took place in the usual way. True, the defendant had been drinking, but the conversation originated not in anger or in heat of passion, and it continued throughout in the same way. While it might be urged that he was not cool and deliberate in his actions because he was drinking, yet, that could not be contrasted or compared with the anger which might come to a man who had been insulted. Hence, the court properly rejected the proposed instruction, particularly in view of the fact that it was without any evidence to support it.

National Enameling & Stamping Company v. Zirkobios, 251 Fed. 184.

CONCLUSION

The Circuit Court of Appeals for the Third Circuit, in the case of *Krafft v. U. S.,* 249 Fed.

919 (affirmed in 247 U. S. 520), approved the holding of the lower court that there were but two questions involved in Espionage cases, both of which were jury questions; the first being whether or not the defendant spoke the words which are alleged in the indictment and the second whether, if he did, what was the intention in his mind in speaking them.

Let us consider the Fourth count for the purpose of this argument. The defendant was charged with having made certain statements with the intent of supporting and favoring the cause of Germany and opposing the cause of the United States therein.

The Congress of the United States, during the stress of a great war, deemed it necessary, in order to safeguard the nation from dangers arising within the body of the people, to curb all seditious utterances. It, therefore, made the offense with which the defendant is charged, a crime against the United States. True, it placed certain restrictions upon the right of free people but they were restrictions that loyal American citizens, particularly those who were compelled by circumstances to stay at home, were proud

and happy to assume. True, it placed a curb upon the right of free speech, but who are the ones who complained? Not the loyal Americans! The only complaints come from pro-Germans and I. W. W.'s, who realize that by their acts and words they continually violated this law.

The Government asked nothing from Henry Albers but implicit obedience to its mandates in time of war and peril. Notwithstanding the existence of this law, the defendant gave expression to words that permit of no misunderstanding as to their nature. The defendant in his brief conceded that he made the statements so attributed to him. There is, therefore, but one question left for determination, and that is his intent in the use of these words. If it was to support and favor the cause of Germany and oppose the cause of the United States therein, he was clearly guilty of the offense. If such was not his intention, then he was not guilty. These were questions of fact for the jury to determine. The evidence concerning these questions was conflicting. The jury, after due deliberation, found the defendant guilty, consequently this court will not undertake to

disturb its verdict, unless there was no substantial evidence to justify such a conclusion.

It must be apparent from the language of this subdivision of the statute that the thing denounced presents no unusual difficulties in ascertaining whether a person is or is not guilty of that offense, but it is very simple in its scope. The word "support" means to vindicate, to maintain, to defend, to uphold by aid or countenance. The word "favor" means to regard with favor, to aid or to have the disposition to aid, to show partiality or unfair bias towards. These are the definitions given by District Judge Trippett in the case of the *U. S. vs. Shulze,* 253 Fed. 377, where a similar indictment was construed. With these definitions in mind, can it be seriously contended that there is no evidence to support the conclusion that Henry Albers intentionally had the disposition to aid and to show unfair bias toward Germany as against this country, when he made the statements he admits he made. Surely, that does not seem improbable when we consider that Henry Albers in 1914 said:

"Before we (Germany) get through with

our British cousins, we will kill every man, woman and child in England."

and in 1915 said:

"One Kaiser and one God."

and in 1917 said:

"The stories of Belgium atrocities were lies.

"The American press was dominated by the English press.

"That the American soldiers were amateurs and could not beat the Germans in a thousand years.*

*This statement was likewise made use of by Julius Rhuberg, Albers' counterpart.

and in the spring of 1918 said:

"Deutchland uber alles."

"I am a millionaire and I will spend every cent that I have to help Germany win the war.

"I am ready to be shot right now for Germany."

and again in 1918 said:

"When the German submarines get well

organized there will be no chance for boats to get across. I hope the submarines blow every British ship out of the water."

Under these circumstances, we earnestly assert that there was substantial evidence to support the verdict of guilty upon this count and that being so, the court cannot and will not undertake to overthrow the verdict that had legally been reached. To do so would merely usurp the function of the trial jury.

We have honestly endeavored in the discussion of this case to confine same to the legal merits involved, but the defendants counsel have seen fit in their brief to go outside the record and assert without right or reason that the verdict was due to the influence of passion and hate engendered by the war. The fact that upon full deliberation, the jury found the defendant guilty only upon two counts and not guilty upon the five remaining counts, must be evidence in itself that there was deliberation with due discrimination by the jury before it would consent to return any verdict at all in the case!

Counsel further elaborates with great skill

and ingenuity upon the self-serving declarations of the defendant. To assert that he has in his heart a love for this country, when at the trial counsel quite readily conceded that the defendant was strongly pro-German prior to the war and in his brief admitted that he made the statements charged in the indictment, is the basest kind of sacrilege! To assert that he showed his loyalty to this Government during the war by the liberal purchase of Liberty Bonds is but a plain subterfuge! While it may be considered a sacrifice for a poor man to invest when he has little money to spare, it certainly cannot be so considered in the case of a wealthy man with hundreds of thousands of dollars to invest and with investments made in a Government that has never repudiated a single obligation! To assert that he displayed his patriotism in his ready and willing acquiescence of his employes to enlist in the service of the United States, is an unworthy attempt to claim credit for something over which he had no control! It would indeed be an insult to the patriotism of young America to charge that their response to the colors was the result of the urging of this self-confessed pro-German, Henry Albers!

While Albers' "patriotic" endeavors, as compiled by his counsel, for the purpose of minimizing the gravity of his spoken words in defiance of law, may be of interest to a trial jury in determining its verdict, or to the trial court in fixing the punishment, it surely cannot be considered here. Suffice it is to say, that the jury, after listening to all the evidence, including Albers' self-serving declarations, decided against him, and having so found, its findings are conclusive upon this court.

Counsel in their well prepared brief, by the steady reiteration of the alleged drunken condition of Albers, by the repeated reference to the harmless, gentle character of Albers, merely seek, as they sought at the trial below, to elicit sympathy for his drunken state and forgiveness for his German soul.

One cannot help but note a striking similiarty with the method employed by the German soldiers to obtain mercy at the hands of their captors in battle. "Kamerad" was often used as we now know, as a means of striking down a too trusting foe! There is no warrant or occasion for counsel's eulogy of the patriotism of Henry Albers, nor for the appeals for sympathy

on his behalf, when one examines the record and finds out who he is and what he has done.

Henry Albers, born and grown to manhood in Germany, left that country of his own free will to come to America, the land of opportunity. He came over a stranger and we made him welcome and permitted him to enjoy the blessings of a free Government. He came over penniless and we afforded him the opportunity to enrich himself. He desired to be one of us and we, in perfect trust and confidence, conferred upon him the greatest honor that could be vested upon one who is foreign born, that of American citizenship. We accepted his oath of allegiance as given in good faith and gave him equal rights in the great inheritance of American opportunity and freedom that had been created by the sacrifice of the blood and treasures of the founders of this country.

Nothing was asked of Henry Albers but decent citizenship and adherence to the ideals and principles of American government. How has he expressed his gratitude in return for its trust and hospitality? The evidence shows that he considered his citizenship as a convenient garment to be worn in time of storm and stress;

that he betrayed the splendid trust that was reposed in him; that he not only was unwilling to manifest any devotion or patriotism for the country of his adoption and sworn allegiance, but by his words and actions supported the cause of a country with which we were engaged in a bitter struggle, a country seeking to destroy the very freedom and liberty which Henry Albers by his oath of allegiance promised faithfully to support. Thus did Henry Albers repay his obligation to his adopted country!

But, says Henry Albers, he meant no harm. True, he did say these things with which he is charged, but he was too drunk to understand; too drunk to intend injury to the Government. To advance such a contention is to admit unconcious disloyalty. How unlike the true American that he claims to be! Would a real patriotic American, even if he had been drinking, say anything that smacked of disloyalty? Would he have reviled and damned his government? Would he have praised Germany and expressed sympathy for its cause? Would he not rather, if prone to talk, extol America and damn its enemies? This, Henry Albers did not do.

It is a well known proverb, "In wine there

is truth." When Henry Albers spoke the things the indictment charges that he spoke, that the witnesses swore he spoke, he spoke what was in his heart, he laid bare his soul, revealed his innermost thoughts and gave to the world his secret that he had kept hidden from the public, but which demanded utterance when drink unsealed his lips. The liquor that he drank did not befog his mind nor paralyze his thoughts: that must be clear from the testimony of the witness, by reason of the intelligent answers he gave to the questions propounded to him that must be clear by reason of the sudden check upon his utterances when discretion re-asserted itself; that must be clear from the emphasis he placed upon his adherence to Germany. The liquor that he drank merely gave him the courage, the bravado, the indifference, to say and do things, that he, as an American citizen, knew he should not lawfully say or do.

We all surely remember the days, when with gloom and depression about us, due to the shifting of the fortunes of war, we sensed and realized that there were a number of pro-Germans about us, discreetly, but at the same time fervently, celebrating the victories of Germany and ex-

ulting in the defeat of our allies in a cause upon which depended the very existence of the land of their adoption. So Henry Albers, when drink loosened his lips, likewise exulted. His body was in America, but his soul was in Germany. Every thought in his mind and every emotion in his heart, through all these years, has been German. There is written all over him "Made in Germany." American life has not dimned that mark in the least.

In closing, we again repeat that Henry Albers said the things with which he stands charged and that in saying them, because of his German heart and German soul, he intended to show unfair bias toward Germany and to oppose the cause of the United States. That was the verdict of the jury. The defendant had a fair and impartial trial at which he was represented by most able counsel. The issues were clearly presented to the jury under proper instructions. The jury found him guilty. We, therefore, earnestly submit that its verdict should not be disturbed.

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